LEE CHENG YEE

v.

TIU SOON SIANG & ANOR

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD YUNUS PCA
[CIVIL SUIT NO: 23-4-89]
24 JANUARY 1998
[1998] CLJ JT(3)

LIMITATION: *Pleading defence of limitation - Claim under s. 7 of Civil Law Act 1956 - Whether limitation must be pleaded as a defence - Whether O. 18 r. 8 of Rules of the High Court 1980 applicable - Distinction between limitation provisions in s. 7 of Civil Law Act 1956 and Limitation Act 1953*

CIVIL LAW ACT: *Damages - Claim under s. 7 - Whether claim must be brought within three years from death - Whether limitation must be pleaded as a defence - Whether O. 18 r. 8 of Rules of the High Court 1980 applicable*

DAMAGES: *Fatal accident - Claims under ss. 7 & 8 of Civil Law Act 1956 - Bereavement - Loss of expectation of life - Loss of earnings - Effect of amendment to Civil Law Act 1956 - Plea of limitation - Whether must be pleaded as a defence*

CIVIL PROCEDURE: *Pleadings - Defence - Limitation - Whether limitation must be pleaded as a defence - Rules of the High Court 1980, O. 18 r. 8 - Civil Law Act 1956, s. 7(5)*

The plaintiff, as the administrator of his wife's estate, sued the defendants under ss. 7 & 8 of the Civil Law Act 1956 ('Act'). The accident occurred on 13 March 1983 but the suit was filed 5 years and 11 months later, ie, on 2 February 1989. Counsel for the defendants contended that if the claim under s. 7 of the Act was to succeed, it had to be filed within three years from the date of the accident. Counsel for the plaintiff argued that limitation was not pleaded in the statement of defence and thus the Rules of the High Court 1980 ('RHC') O. 18 r. 8 would be applicable. The issues before the court were: (i) whether limitation had to be pleaded as a defence; (ii) whether the plaintiff could claim under s. 7 of the Act, for bereavement and for contribution towards child care; and (iii) whether the plaintiff had a legal right to an estate claim under s. 8 of the Act.

Held:

[1] Where there are exceptions to the operation of a limitation provision as in the Limitation Acts, the plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant. Only in those situations will O. 18 r. 8 of the RHC apply. However, s. 7(5) of the Act contains **no** exceptions and it is **absolute** in nature and so the requirement that it be pleaded does **not** arise.

[2] In the present case, a statement of defence was filed but no limitation period was pleaded as a defence. To satisfy O. 18 r. 8 of the RHC the plea on limitation must be expressed in the pleading **but** only in respect of a limitation that is **not** absolute. Therefore, O. 18 r. 8 of the RHC does **not** apply to the limitation provision under s. 7(5) of the Act. Hence, the claim for dependency under s. 7 of the Act would fail, even if there was evidence or proof to that effect.

[2a] The contribution made to having the child looked after could not be considered as it was barred by the limitation period. Apart from that, the child was neither made a party to the suit nor was she mentioned anywhere in the statement of claim.

[2b] The claim for bereavement could not succeed as this was a case before the amendment which took effect from 1 October 1984.

[3] By virtue of s. 8(5) of the Act, the plaintiff had a legal right to take advantage of the estate claim under (a) loss of expectation of life and (b) lost years. The deceased was 27 years old at the time of the accident and the court assessed the award to be RM6,000. On the issue of loss of earnings, the deceased was unemployed at the time of the accident and so would not be entitled to any award.

[Plaintiff's claim allowed in part with costs.]

Cases referred to:

Bentham v. Gambling [1941] AC 157 ***(cit)***
Flint v. Lovell [1935] 1 KB 354 ***(refd)***
Koo Wah & Anor v. Wong Ying Choon & Anor [1965] 2 MLJ 21 ***(refd)***
Kuan Hip Peng v. Yap Yin & Anor [1965] 31 MLJ 252 ***(refd)***
Lee Sai Cheong v. Wan Lim Cheong [1962] 28 MLJ 259 ***(refd)***
Seenivasan & Anor v. Lim Yew Seng [1961] 27 MLJ 22 ***(refd)***
Teoh Kim Seng v. Hassan Mohamed & Anor [1987] 2 CLJ 205 ***(refd)***

Legislation referred to:
Civil Law Act 1956, ss. 7(5), 8(5)
Rules of the High Court 1980, O. 18 r. 8(1)
Rules of Supreme Court 1957, O. 25 r. 4

Other source referred to:
Mallal's Supreme Court Practice, 2nd edn, p 196

For the plaintiff - Bastian Pius Vendargon; M/s Vendargon & Partners
For the defendant - Jagjit Singh; M/s Jagjit Singh & Co

Reported by Michele Saw

JUDGMENT

Lamin Mohd Yunus PCA:

This is a claim as a result of a motor accident which took place on 13 March 1983 at about 9.45am at or about 8th milestone Jalan Mersing Endau. The plaintiff (SP1) was then driving a motorcar registration number JAM 2541 from Kuantan to Johore. At about that time the second defendant was driving a motor lorry registration number TD 9278 belonging to the first defendant from Johore to Kuala Trengganu that is to say from the opposite direction and collided into the plaintiff's motorcar.

Before the commencement of the trial, learned counsel for the defence conceded that liability on the part of the defence was 100%. The only thing for me to do now is to assess the damages due to the plaintiff as administrator of the estate of his deceased wife Chia Miew Hien. With the plaintiff in the car was his wife Chia Miew Hien and she died instantly in the accident due to massive head injury.

The deceased was a graduate from the Royal Melbourne Institute of Technology Australia. She graduated in Applied Science, majoring in Computer Science. Immediately upon graduation she worked in Australia for about six months with a company called SKF Australia (Sales) Pty. Ltd. Upon returning to Malaysia she was employed in Singapore beginning about the month of August 1981 by United Engineers (Singapore) Pte. Ltd. as evidenced by the letter of offer from the said company (see NAD p. 1) with a salary of S$1,000pm to begin with. She had to have a work permit and it was approved (P9 is the approval letter dated 14 July 1981). She started working on 3 August 1981. She stopped work some time in February 1982. Their first and only child, according to SP1 was born on 20 November 1982. At the time of the accident the child was about 3½ months. The deceased had been looking after

the baby before her death. After the accident, SP1's mother looked after the baby and she still continues to look after the child. SP1 has been giving his mother on the average of RM400pm for the care of the child.

SP1 has been working as a planter with Sime Darby Plantations since May 1981. As he has been subjected to transfer to the various Sime Darby estates some of which are found in the remote part of the country. As he found it not practical to raise a baby or child in any of those estates he therefore left his child (daughter) with his mother in Kuantan. He visited her frequently and at the time of the trial she was schooling in Kuantan.

In cross-examination, SP1 agreed that his wife, the deceased, was retrenched on 15 February 1982 because of recession in Singapore. She worked with United Engineers from 3 August 1981 to 15 February 1982. Therefore at the time of the accident she was unemployed. SP1 agreed.

At the time of the accident SP1 said that possibly he was earning RM1600pm.

At the time of the trial, SP1's daughter was in Std. IV in the Methodist Primary School, Kuantan.

SP1 take-home pay as Sr. Assistant Manager (at the time of the trial) was RM3,300pm. When the deceased was working, she contributed 70% of her income to the family living expenses and the balance 30% for herself.

Encik Vendargon, learned counsel for the plaintiff submitted that the deceased was earning $1000 Singapore dollars and on conversion to Malaysian dollars it would be RM1,500pm. He was asking the court to make the award under s. 7 of the Civil Law Act 1956. But as was submitted by Encik Jagjit, learned counsel for the defendant, if the claim under s. 7 was to succeed, it must be filed within three years from the date of the accident. The accident occurred on 13 March 1983 while the writ and the statement of claim were filed almost five years and 11 months later ie, on 2 February 1989.

Subsection (5) of s. 7 states:

> (5) Not more than one action shall be brought for and in respect of the same subject matter of complaint if, and every such action shall be brought within three years after the death of the person deceased.

Encik Vendargon's answer was that limitation was not pleaded in the statement of defence and cited *Mallal's Supreme Court Practice* 2nd edn p 196 on the full effect of O. 18 r. 8.

Order 18 r. 8(1) reads:

> (1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance release, any relevant statute of limitation, fraud, or any fact showing illegality:
>
> a) ...
>
> b) ...
>
> c) ...

Page 196 of *Mallal* reads:

> "Limitation: There is an obligation imposed by the law of procedure in this country requiring the party relying upon the statute of limitation, specifically to plead it, and failure to do so robs him of the value of the Statute. It is no part of the duty of the court to take notice of the Statute of limitation unless it is specifically pleaded.

It must be remembered that for the purpose of present case, we are dealing with the limitation provision under the Civil Law Act 1956. We are not concerned with the provisions of the Limitation Act 1953 (Act 254). Thomson LP (as he then was) delivering the judgment of the Federal Court in the case of *Kuan Hip Peng v. Yap Yin & Anor*. [1965] 31 MLJ 252 explained the difference in application between the two Statutes. The brief facts of the case are as in the head note and I now repeat for convenience:

> The plaintiff-appellant suing by his next friend claimed compensation under the Civil Law Ordinance for loss arising from the death of his father as a result of the alleged negligent driving of a motor vehicle owned by the first respondent and driven by the second respondent. The writ was issued four days after the expiry of the period of three years prescribed in s. 7(5) of the Ordinance. No defence was filed but the respondents applied by summons for the writ to be struck out under O. 25 r. 4 on the ground that the claim endorsed on it was frivolous and vexatious and an abuse of the process of the court. The trial judge made an order dismissing the suit and the appellant appealed. The grounds of appeal were that the application to strike out was premature as it was made before the defence was filed and in particular that no such order should have been made on the application of a defendant who wished to take advantage of a statute of limitations.

The Federal Court dismissed the appeal and Thomson LP (as he then was) said:

Now it is clear from the general course of reasoning upon which it is based and from the reference to the Real Property Limitation Acts that the case of *Dismore v. Milton supra*, has no application in relation to a Statute of Limitations which is absolute and without exceptions.

Where there are exceptions which would affect the operation of the statute it is clear that a plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant (see *Dawkins v. Penrhyn, supra; Busch v. Stevens*).

But that is not the position in the present case. The terms of s. 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that "such action shall be brought within three years after the death of the deceased person". It is true that, as Goddard LJ said with reference to the corresponding section of the English Act, the section "merely prescribes a period of limitation" *(Lubovsky v. Snelling)* and that it does not contain a condition precedent or anything of the sort. Nevertheless the period is absolute. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward v. "Vera Cruz"*). There are none of the saving provisions in favour of a plaintiff that were found in the Statute of James I and are to be found to-day in the English Limitation Act of 1939 or our own Limitation Ordinance of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action *(Lubovsky v. Snelling, supra)* and would require to be set out in the statement of claim.

Finally, there can be no question of importing into the matter any of the saving provisions of the Limitation Ordinance by any process of construction for by s. 3 of that Ordinance it "shall not apply to any action ... for which a period of limitation is prescribed by any other written law.

So where there are exceptions to the operation of a limitation provision as in the Limitation Act, the plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant. Only in those situations O. 18 r. 8 will apply. But as was pointed out by Thomson LP (as he then was) s. 7(5) of the Civil Law Act contains no exceptions and it is absolute in nature and so the requirement that it be pleaded does not arise. It may be argued however that the facts in *Kuan Hip Peng* are not on all fours with those in the present case. In both cases the writ was filed after the expiry of the period of three years prescribed in s. 7(5) of the Civil Law Act. In *Kuan Hip Peng* no defence was filed but the respondents applied by summons for the writ to be struck out under O. 25 r. 4 Rules of Supreme Court 1957 on the ground that the claim was frivolous and vexatious and an abuse of the

process of the court. The supporting affidavit provided the basis for the application and it stated thus:

> The action commenced by the writ of summons herein must necessarily fail because it was not brought within three years after the death of the deceased person in question.

In the case before me, a statement of defence was filed but no limitation period was pleaded as a defence. Learned counsel for the defendant/respondent pleaded limitation only from the bar table. To satisfy O. 18 r. 8 of the Rules of High Court 1980 the plea on limitation must be expressed in the pleading and under *Kuan Hip Peng* it is only in respect of a limitation that is not absolute such as one under the Limitation Act. Clearly O. 18 r. 8 of Rules of High Court 1980 does not apply to the limitation provision under s. 7(5) of the Civil Law Act.

The claim for dependency under s. 7 must therefore fail. That would mean that the deceased's contribution to the family's living expenses to the about of 70% of her monthly income as claimed by SP1 cannot be considered even if there was evidence or proof to that effect.

In the present case no evidence was forthcoming to substantiate the claim. She was not even gainfully employed at the time of the accident. Also the contribution of about RM400 by SP1 made to his mother in looking after his child cannot be considered. Apart from being barred by limitation, the child has not been made a party to the suit and not even mentioned anywhere in the statement of claim. The claim for damages for bereavement must also go. Apart from being struck by the limitation period, claim for bereavement cannot succeed as this is a case before the amendment which only took effect from 1 October 1984.

Encik Jagjit submitted that the plaintiff counsel only opted for dependency claim under s. 7 of the Civil Law Act as he has abandoned the estate claim under s. 8. It was not clear whether he has abandoned completely the estate claim because what he said was that since it was felt that the claim under s. 7 would be greater in amount he would therefore be asking for s. 7 to apply. He never anticipated that the claim under s. 7 would be struck down by the limitation provision under s. 7(5). In fact from his submission he was confident that his claim under s. 7 would succeed as limitation was not pleaded in the defence. For the reasons I said above that the limitation must operate against his claim under s. 7, and that by virtue of sub-s. (5) of s. 8, he has a legal right to take advantage of the estate which in the interest of justice I ought to consider. Accordingly I now proceed to do so.

For the estate claim two items may be considered namely:

(a) loss of expectation of life; and

(b) for lost years.

The rationale for allowing damages for loss of expectation of life was discussed by the Court of Appeal in England in the case of *Flint v. Lovell* [1935] 1 KB 354 where a 69 year old man was knocked down by a car driven by a lady. At the time of the accident he was 69 but he was 70 at time of the trial. According to medical testimony at the trial he was not expected to live for long "probably something under a year". But Green LJ came to the conclusion that this rule had no application in a case where the plaintiff was still alive at the date of the trial. It would not be assessed for example on the basis that the mental pain and suffering had been increased by the prospect of his early death but simply that his life has been shortened by the accident. It must be the natural and direct result of the accident.

In *Seenivasan & Anor. v. Lim Yew Seng* [1961] 27 MLJ 22, the trial judge awarded $3,500 for loss of expectation of life and it was upheld by the Court of Appeal. The deceased was a married woman and her husband was suing as the administrator of her estate.

In *Lee Sai Cheong v. Wan Lim Cheong* [1962] 28 MLJ 259, the plaintiff was the father and administrator of estate of the son named Wan Thai Thong who was 19 years of age at the time of the accident. For loss of expectation of life under s. 8 the trial judge awarded $5,000. The deceased was a pupil in the commercial class of the Anderson School Ipoh. On appeal to the Court of Appeal, Thomson CJ (as he then was) wrote the leading judgment of the court where he reviewed some of the early English cases among which were *Flint v. Lovell* [1935] 1 KB 354 and *Bentham v. Gambling* [1941] AC 157. Viscount Simon sitting in the Court of Appeal in *Bentham v. Gambling* said that the thing to be valued was not the prospect of length of days "but the prospect of a predominantly happy life". Thomson CJ then had this to say:

> With great respect I would express the view that that case may be regarded as establishing three things. The first is that loss of expectation of life in so far as it is a loss must be regarded as mainly consisting in loss of happiness and happiness is something that is incapable of measurement or evaluation in terms of money. The second is that having regard to the fundamental human decencies any compensation which is given in this connection should be moderate. The third is that the case is a clear invitation by the House of Lords to courts trying the issue to forego the exercise to the ordinary extent of their discretion and accept some sort of conventional measure of damages. This invitation has been accepted by the Courts in England where, since 1941,

damages under this head have varied from a minimum of £100 to a maximum of £500 as shown in the table in *Bingham's Motor Claims Cases* (4th Edn. p. 428). The latest reported case is that of *Wise v. Kaye* where Sellers LJ refers (at p. 101) to an award of £400 for loss of expectation of life as bearing "reference to the conventional figure, as it has become, under the decision of the House of Lords in *Benham v. Gambling.*

Here and in Singapore the amounts awarded in the past have varied from $1,000 to $3,500.

Finally Thomson CJ said:

I would say that in this country at the present time this court should express the view that the conventional figure in the case of a young adult should be $3,000 and that view should be accepted by judges.

In 1965 in the case of *Koo Wah & Anor. v. Wong Ying Choon & Anor.* [1965] 2 MLJ 21, the court awarded for loss of expectation of life to the estate of a young adult of the age between 18 and 21 the sum of $3,000. In the case of *Teoh Kim Seng v. Hassan b. Mohamed & Anor*. [1987] 2 MLJ 209 the Supreme Court thought the reasonable figure should be $6,000 and not $4,000 as assessed by the trial judge for a 12 year old boy. The deceased died in 1981 and therefore the 1984 amendment to s. 8 does not apply and so the award for loss of expectation can still be made.

In the present case, the deceased was 27 at the time of the accident (1983). I would assess the figure as RM6,000 being a reasonable figure.

On the issue of loss of earnings, she would not be entitled as she was unemployed at the time of the accident and in fact not been employed for one year before the accident.

With regard to special damages both parties agreed at the trial as to quantum and I now repeat them:

a) Funeral expenses	–	RM1,500
b) Fee for applying for Letter of Administration	–	RM350
c) Costs of police report, RIMV report, post-mortem report etc.	–	RM88

In the present case, I shall allow only the following and order accordingly:

(a) Special Damages (as agreed) – RM1,938

(b) All claims for General Damages under s. 7 of the Act including for bereavement are dismissed – -

(c) General Damages under s. 8 of the Act

i) for loss of expectation of life – RM6,000

ii) for loss of earnings is dismissed – -

(d) Interest:

i) at 4%pa on special damages from date of accident to date of judgment and thereafter until realisation at 8%pa.

ii) at 8%pa for lost of expectation of life from service of writ to realisation

(e) and costs.